

**Christoph Schwaiger**

**vs**

**Office of the Commissioner  
for Voluntary Organisations**

**FOI REQUEST**

1. On the 6<sup>th</sup> October 2022, Mr Christoph Schwaiger (the “**applicant**”) made a request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (the “**Act**”), Chapter 496 of the Laws of Malta, requesting the Office of the Commissioner for Voluntary Organisation (the “**Public Authority**”) to provide a “*copy of the five (5) investigation reports concluded by the Commissioner for VOs in 2020*” in electronic format.
2. On the 24<sup>th</sup> October 2022, the Public Authority informed the applicant that access would be granted. With its reply, the Public Authority provided a document, which contained the following information: “[t]here were 5 investigations for 2020 and 6 for 2021. 2 new investigations for 2022. Kindly note that Investigations could not be broken down by month as these were long ongoing to be concluded.”
3. On the 24<sup>th</sup> October 2022, the applicant presented a complaint through the internal complaints procedure of the Public Authority. The applicant submitted that the “*FOI request was for a copy of the finalised investigation reports. The request was not for information about how many such reports were completed. The PA is requested to send a full copy of the 5 investigations to the applicant*”.
4. On the 26<sup>th</sup> October 2022, the Public Authority informed the applicant that his request could not be met “*because the information relating to a decision or recommendation, requested pursuant to article 20 of the Act is being withheld in terms of Part V or Part VI of the said Act.*”

*Documents submitted by VOs are public domain as per article 40 of VO Act. On the other hand, the gathering of information for investigations is governed by Article 34 of the same act. However any information relating to investigations is confidential as stipulated in last paragraph of Article 34(10) of the act that states: “Provided further that any privileged information obtained by the Commissioner upon such request, shall be used exclusively for the purposes of the powers vested in him in terms of this article and shall not be made accessible to the public”. Hence such information related to investigations cannot be disclosed”.*

## **FOI APPLICATION**

5. On the 13<sup>th</sup> December 2022, the applicant applied for a decision notice pursuant to article 23(1)(a) of the Act, requesting the Information and Data Protection Commissioner (the “**Commissioner**”) to decide whether the Public Authority has dealt with the requirements of the Act. In particular, the applicant requested the Commissioner to investigate: “*a) the false statement given to the applicant by the PA on 24/10/2022*” and “*b) the applicant’s continued maintaining of his position that; i) Article 34(10) pertains only to privileged information. The applicant should be granted access to the requested documentation, following any necessary redactions in compliance with Article 34(10), in the original format in which it was requested*”.

## **INVESTIGATION**

### **Admissibility of the FOI Application**

6. After having considered that the applicant is an eligible person in terms of article 2 of the Act and the nature and background of this FOI application, together with the procedural steps involved between the applicant and the Public Authority in the request for documents, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

### **Submissions received from the Public Authority**

7. As part of the investigation procedure, by means of an information notice dated the 31<sup>st</sup> January 2023, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide information in relation to the FOI application for the purposes of enabling him to exercise his functions under the Act and to determine whether the Public Authority has complied with the requirements of the Act.

8. On the 2<sup>nd</sup> February 2023, the Public Authority reiterated its reply provided to the applicant on the 26<sup>th</sup> October 2022 and further submitted:
- a. that it did not provide false statement in its reply dated the 24<sup>th</sup> October 2022 and proceeded to explain that when a FOI request is received through the FOI portal, it is the understanding of the Public Authority that the request has to be first marked as accepted in order to be able to validate and process the request within the stipulated time-frame;
  - b. that investigations may contain sensitive information pertaining to the nature of the investigations apart from data like bank statements, anonymity of complainants and sensitive personal information about administrators;
  - c. that investigations conducted by the Public Authority may be forwarded to other regulatory or enforcement authorities for further action;
  - d. that investigative reports drawn up by the Public Authority always contain sensitive data that could not be submitted to any member of the public in view of the nature of the investigations conducted by the Public Authority;
  - e. that if privileged information was disclosed, the Public Authority would be causing harm to the protected interested third parties that make part of any VO investigation or possibly prejudice further investigations if ever required; and
  - f. that the disclosure of private information without the consent of the persons involved is another breach of the law.

#### **Submissions received from the applicant**

9. On the 19<sup>th</sup> February 2023, the applicant rebutted the arguments of the Public Authority and submitted the following:
- a. that, on the 24<sup>th</sup> October 2022, the Public Authority informed the applicant that his request had been accepted in full, and this reply is misleading and false;

- b. that article 34(10) of the Voluntary Organisation Act pertains to privileged information and thus, information which has not been gathered from the Police, FIAU etc. is not privileged information;
- c. that if there are personal data contained in the requested documents, the information pertaining to identified or identifiable individuals may be redacted;
- d. that the Public Authority seems to be more interested in protecting the potential reputational harm of voluntary organisations it is investigating for wrongdoing rather than serving the good people of the Republic of Malta by disclosing the requested information which pertains to organisations eligible to receive funding from the taxpayer;
- e. that the public interest in favour of disclosure is necessary to ensure the good conduct of organisations operating in Maltese society which can influence said society for better or for worse; and
- f. that it is not the remit of the Public Authority to decide for law enforcement and investigation agencies of the Government of Malta about which documents will and won't interfere with their work.

#### **Final submissions received from the Public Authority**

- 10. On the 6<sup>th</sup> March 2023, the Public Authority submitted its final submissions for the Commissioner to consider in the legal analysis of this case:
  - a. that privileged information does not define and limit to any information gathered from the Police and the FIAU as the applicant is suggesting;
  - b. that article 34(10) of the Voluntary Organisation Act (Cap. 492 of the Laws of Malta) states that privileged information obtained by the Public Authority shall be used exclusively for the purposes of the powers vested in the Commissioner for Voluntary Organisations and shall not be disclosed to the public;
  - c. that the same wording and protection to documents emanate from article 30 to 36 of the Act, which provisions aim to protect the information acquired, the identities of

subjects, the running of the investigated association itself, the protection of the investigator officer or other employees who conduct investigations, or the economy of the association;

- d. that not all personal data could be redacted as the applicant is stating in his submissions and that investigative reports may still shed light on identities;
- e. that investigative reports are intense and are legally bound even by legal ethics as these may be used by higher judicial bodies and thus, the disclosure of the requested documents could jeopardise other investigations;
- f. that with reference to the applicant's submissions, if an association is being investigated by the Public Authority, it does not always mean that the association committed a wrongdoing and investigations are conducted to either establish an illegality or else to assure the transparency of an association and hence, even if the association did not commit any wrongdoing, the disclosure would still harm its economical operations;
- g. that, furthermore, the investigations of the Public Authority may be referred to other investigative authorities and thus, the Public Authority could not divulge investigative reports to safeguard the investigations;
- h. that the Court of Justice of the European Union sheds further light on privileged information in its judgment '*VM, Sovim SA vs Luxembourg Business Registers*'<sup>1</sup> of the 22<sup>nd</sup> November 2022; and
- i. that the Public Authority referred to the judgment of the Court of Appeal<sup>2</sup> in its inferior competence '*Matthew Vella vs the Commissioner for Data Protection*', which findings of the Court corroborate the foregoing arguments.

## LEGAL ANALYSIS AND DECISION

11. As a preliminary step, the Commissioner examined the first part of the FOI application, wherein the applicant argued that the Public Authority provided a false statement when it informed the

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<sup>1</sup> Joined Cases C-37/20, C-601/20, Judgment of the Court (Grand Chamber) of the 22<sup>nd</sup> November 2022.

<sup>2</sup> Appeal no. 1/2017, Judge A. Ellul decided on the 5<sup>th</sup> October 2018.

applicant that full access would be provided. The reply of the Public Authority provided on the 24<sup>th</sup> October 2022 contained a document with the following information: “*There were 5 investigations for 2020 and 6 for 2021. 2 new investigations for 2022. Kindly note that Investigations could not be broken down by month as these were long ongoing to be concluded*”.

12. The Commissioner noted that article 15(1)(a) of the Act obliges the Public Authority to give the applicant the reasons for the refusal of the FOI request. In this regard, article 14 of the Act sets forth the number of reasons which enable the Public Authority to refuse the FOI request. Thus, the first reply provided by the Public Authority on the 24<sup>th</sup> October 2022 contains information which was not requested by the applicant and did not state the reason of refusal in terms of the requirement held in article 15(1)(a) of the Act.
13. For the purpose of the investigation of the second part of the FOI application, the Commissioner sought to establish whether the Freedom of Information Act applies to the request made by the applicant, wherein the Public Authority was requested to provide a “*copy of the five (5) investigation reports concluded by the Commissioner for VOs in 2020*” in electronic format.
14. In the second reply provided to the applicant and the submissions provided during the course of the investigation, the Public Authority cited the non-applicability of the Act on the basis that article 34 of the Voluntary Organisation Act (Cap. 492 of the Laws of Malta) prohibits the disclosure of the documents requested by the applicant.
15. In this regard, the Commissioner examined article 5(3)(b) of the Act, which states that the Act shall not apply to documents which contain information the disclosure of which is prohibited by any other law. The Court of Appeal<sup>3</sup> confirmed that the doctrine of the *lex specialis derogat generalis* applies when the disclosure of the requested documents is prohibited by a provision contained in the *lex specialis*.
16. In his assessment, the Commissioner considered article 34 of Cap. 492, wherein the Public Authority is empowered to request information from various sources relating to the operation of a voluntary organisation or related to any person involved in the activities of a voluntary organisation, and this effectively demonstrates the powers of the Public Authority in relation to the collection of information for the purpose of fulfilling its investigative function.

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<sup>3</sup> Appeal number: 61/2018, ‘*Il-Kummissajru għall-Infommazzjoni u l-Protezzjoni tad-Data, Allied Newspapers Limited, Jacob Borg għal kull interess li jista’ jkollu*’, decided by Judge Joanne Vella Cuschieri on the 11th October 2019.

17. In particular, the Commissioner noted that some of the sources from where the Public Authority may request information are protected by other legislation. In particular, article 34(6) of Cap. 492 states that the Public Authority may request information from any person who is bound by a duty of professional secrecy under the Professional Secrecy Act (Cap. 377 of the Laws of Malta). This provision limits the use of this information by stating that “[a]ny information obtained by the Commissioner upon such a demand shall be used exclusively for the purposes of this article”. Thus, this shows that the information which is gathered from persons who are bound by professional secrecy shall not be used for purposes other than that of investigating individuals and voluntary organisations.
18. Additionally, article 34(10) of Cap. 492 enables the Public Authority to obtain information from various entities or authorities, including, but not limited to “*the Registrar for Legal Persons, the Malta Security Service, Jobsplus, the Commissioner of Police, the Commissioner for Revenue, the Financial Intelligence Analysis Unit, the Asset Recovery Bureau, the Malta Financial Services Authority and the Courts of Justice*”. In conjunction with this provision, the first proviso to article 34(10) of Cap. 492 states that the Public Authority may also process information from the Registrar of Courts, or the Office of the Attorney General or the Office of the State Advocate.
19. Accordingly, the Commissioner considered the second proviso to article 34(10) of Cap. 492, which was repeatedly cited by the Public Authority in its submissions, and which proviso states “*that any privileged information obtained by the Commissioner upon such request, shall be used exclusively for the purposes of the powers vested in him in terms of this article and shall not be made accessible to the public*”.
20. Some of the authorities and entities mentioned in article 34(10) of Cap. 492 are vested with investigative powers and, in certain instances, even corrective and prosecution powers. This is also without prejudice to the fact that two of the authorities mentioned in article 34(10) of the Act, specifically the Malta Security Services and the Office of the Attorney General, are exempted from complying with the provisions of the Act due to the nature of the information which they process for the purpose of fulfilling their functions.
21. This led the Commissioner to establish that article 34 of Cap. 492 ought to protect the requested documents from disclosure, particularly, due to the sensitivity of the sources from where the information may be obtained by the Public Authority, including individuals who may be bound by the professional secrecy, and the nature of the information processed by the Public Authority

for the purpose of effectively conducting its investigations in accordance with the provisions of Cap. 492.

**On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and concluding that:**

- a. the Public Authority infringed article 15(1)(a) of the Act when it failed to give the applicant the reason for the refusal of his request in its reply dated the 24<sup>th</sup> October 2022; and**
- b. the Act does not apply to the documents requested by the applicant in so far as such documents contain information the disclosure of which is prohibited by the Voluntary Organisation Act (Cap. 492 of the Laws of Malta).**

**The Commissioner rebukes the Public Authority on the manner how the request was handled, particularly, that the applicant was not provided with a reason of refusal in the reply dated the 24<sup>th</sup> October 2022. Furthermore, the Commissioner emphasises on the requirements incumbent of public authorities to provide applicants with clear and correct reasons or grounds when refusing requests for documents.**

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by Ian DEGUARA  
**DEGUARA** (Signature)  
(Signature) Date: 2023.03.08  
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**Ian Deguara**  
**Information and Data Protection Commissioner**



## **Right of Appeal**

In terms of Article 39(1) of the Act “*where a decision notice has been served, the applicant or the public authority may appeal to the Tribunal against the notice within twenty working days.*”

An appeal to the Tribunal shall be made in writing and addressed to:

The Secretary  
Information and Data Protection Appeals Tribunal  
158, Merchants Street  
Valletta.